

FACTUAL HISTORY

On November 29, 1994 appellant, then a 42-year-old mail handler, filed an occupational disease claim for bilateral wrist weakness and pain. The claim, adjudicated by OWCP under File No. xxxxxx291, was accepted for bilateral carpal tunnel syndrome. Appellant underwent surgical repair on September 25 and October 30, 1996 on the right and left respectively. She returned to a modified mail handler position on February 10, 1997. By decision dated October 6, 1997, OWCP found that appellant's actual earnings in the modified position fairly and reasonably represented her wage-earning capacity with zero loss. On April 24, 1998 appellant was granted a schedule award for 10 percent impairment of the right upper extremity and 5 percent impairment on the left.

On March 16, 1999 appellant filed a traumatic injury claim, alleging that she strained her arms, shoulder and hands lifting a tub of mail on March 13, 1999 when she stopped work. OWCP adjudicated the claim under File No. xxxxxx777 and accepted right shoulder strain and right partial rotator cuff tear. On June 21, 1999 appellant returned to limited duty at the nixie table. She continued in the position until July 26, 2004 when she underwent authorized arthroscopic repair of the torn right rotator cuff. Appellant returned to modified duty on October 12, 2004. In March 2007, she began working as a security monitor. On April 11, 2007 appellant was granted a schedule award for an additional 18 percent impairment of the right upper extremity. On November 26, 2007 OWCP's hearing representative affirmed the April 11, 2007 decision. Appellant returned to the nixie position in February 2009.

In duty status reports dated April 9 to August 31, 2010, Dr. Jacob Salomon, a Board-certified surgeon, noted diagnoses of right rotator cuff tear, bilateral carpal tunnel syndrome and right brachial plexus injury and provided restrictions to appellant's physical activity. In an April 23, 2010 report, Dr. Blair Rhode, a Board-certified orthopedic surgeon, provided physical examination findings and diagnosed shoulder pain, complete rupture of rotator cuff, acromioclavicular internal derangement, neck pain, carpal tunnel syndrome and wrist pain. Dr. Alex Vargas, a Board-certified anesthesiologist, provided a May 25, 2010 report in which he noted appellant's complaint of worsening posterior cervical neck pain and associated right upper extremity radicular symptoms. Following physical examination and review of a cervical spine magnetic resonance imaging (MRI) scan study, he diagnosed multilevel degenerative cervical spondylosis, cervical degenerative disc disease with disc herniations at C4-5 and C5-6 and chronic right shoulder pain. Dr. Vargas performed cervical epidural injections on June 10, July 17, August 23 and September 7, 2010.

Appellant continued in the nixie position until October 6, 2010 when she was dismissed under the National Reassessment Process (NRP). She filed CA-7 forms, claims for compensation, beginning October 6, 2010 and continuing. On November 9, 2010 OWCP doubled appellant's claims and informed her of the criteria for modifying the October 6, 1997 wage-earning capacity decision.

By decision dated December 2, 2010, OWCP referenced medical reports dated April 23 to September 7, 2010 from Dr. Rhode and Dr. Vargas and denied modification of the October 6, 1997 wage-earning capacity decision. In a letter dated December 6, 2010, appellant requested

reconsideration² and submitted duty status reports dated October 19 to December 8, 2010 in which Dr. Salomon reiterated his findings and conclusions. In reports dated November 24 and December 7, 2010, Dr. Salomon described her employment injuries and her complaints of chronic neck and arm pain. He noted that a cervical spine MRI scan study demonstrated spondylosis with multilevel cervical disc disease and compression of the cervical nerves and opined that lifting trays and heavy tubs of mail would be enough to aggravate the cervical condition. Dr. Salomon requested that a cervical condition be added to the accepted conditions.

In a nonmerit decision dated January 3, 2011, OWCP stated that it had reviewed appellant's December 7, 2010 letter requesting reconsideration and denied the request.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³

OWCP procedures provide that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁴

Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.⁵

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination. This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination. This narrow exception is only applicable for brief periods of medical disability. It does not apply to situations where there is a

² The form requesting reconsideration was dated December 7, 2010.

³ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ *Id.* at *supra* note 4 at Chapter 2.814.9(a) (December 1995).

⁵ *Id.* at Chapter 2.814.11 (June 1996).

wage-earning capacity determination in place and the employee claims additional wage-loss compensation due to the withdrawal of light-duty work.⁶

FECA Bulletin No. 09-05 outlines very specific procedures for light-duty positions withdrawn pursuant to the NRP. Regarding claims for total disability when a wage-earning capacity decision has been issued, OWCP should develop the evidence to determine whether a modification of that loss of wage-earning capacity position is appropriate.

ANALYSIS -- ISSUE 1

The Board finds this case is not in posture for decision. Appellant was a full-time mail handler when OWCP accepted her initial claim for bilateral carpal tunnel syndrome in 1995. She had surgery on her hands on August 25 and November 30, 1996 and returned to work in a modified mail handler position on February 10, 1997. By decision dated October 6, 1997, OWCP found that appellant's actual earnings in the modified position fairly and reasonably represented her wage-earning capacity with zero loss. There were two periods of intermittent disability after the October 6, 1997 decision was issued. Appellant was off work from March 13 through June 21, 1999 as a result of traumatic injury, accepted for right shoulder strain and right partial rotator cuff tear. She returned to the modified position of June 21, 1999 and worked in that position until July 26, 2004, when she underwent surgery to repair the rotator cuff tear. Appellant returned to the modified position on October 12, 2004.

The record reflects that in March 2007 appellant began work as a security monitor. In February 2009, she returned to the previous modified position on which the October 6, 1997 wage-earning capacity decision was based and she continued in that position until October 6, 2010 when she was laid off due to the NRP. Appellant filed claims for disability commencing on October 6, 2010 and continuing. By letter dated November 9, 2010, OWCP advised her that she had a loss of wage-earning capacity in place and informed her of the criteria for modifying the October 6, 1997 wage-earning capacity determination.

In a December 2, 2010 decision, OWCP denied appellant's claim for modification of the October 6, 1997 wage-earning capacity decision, on the grounds that the medical evidence was insufficient to meet the requirements for modification. It noted that the medical evidence did not reflect that the accepted conditions had materially changed; rather, the physician suggested her conditions were related to nonaccepted conditions. OWCP did not discuss whether the "original determination was erroneous" or whether "appellant had been retrained or vocationally rehabilitated" and did not indicate that it had assessed appellant's case in accordance with FECA Bulletin 09-05 which discusses the proper procedures to be followed when a wage-earning capacity decision is in place and the dismissal of a claimant is due to the NRP.⁷

The Board therefore finds the case is not in posture for decision and must be remanded to OWCP. On remand OWCP should follow the procedures found in FECA Bulletin 09-05 to determine if appellant met her burden to modify the October 6, 1997 wage-earning capacity

⁶ *K.R.*, Docket No. 09-415 (issued February 24, 2010).

⁷ *Id.*

determination. Following remand, it should render an appropriate decision on the merits of appellant's claims for compensation beginning October 6, 2010.

In light of the Board's decision regarding Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant established that she sustained a recurrence of disability on October 6, 2010.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2011 and December 2, 2010 decisions of the Office of Workers' Compensation Programs are vacated and the case remanded to OWCP for proceedings consistent with this order of the Board.

Issued: July 11, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board